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THE UNBUNDLED EXECUTIVE

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INTRODUCTION

That the United States Constitution establishes a single executive is incontrovertible as a historical matter;\(^1\) a plural executive was debated and rejected.\(^2\) As a matter of constitutional theory and institutional design, however, this conclusion is far from inevitable and likely incorrect. The convention era debates about single versus plural executives exhibited fundamental confusion about the relationship between numerosity in the executive, the structure of executive authority, and core democratic values like accountability, coordination, and uniformity. This confusion is understandable given the extraordinary pedigree of single executives in constitutional theory, including, but not limited to Locke,\(^3\) Blackstone,\(^4\) Hamilton,\(^5\) and Montesquieu,\(^6\) and the historical fact that most plural executive regimes were ineffectual councils. But the conventional justifications for rejecting plural executives are powerful weapons against only some very specific forms of plural executive regimes. Unfortunately, this early confusion has been replicated over and over in more recent debates about the unitary executive and the scope of executive authority.

This Article articulates and analyzes the possibility of what we call the unbundled executive. The unbundled executive is a plural executive regime in which discrete authority is taken from the President and given exclusively to a directly elected executive official. Imagine a directly elected War Executive, Education Executive or Agriculture Executive. We show that a partially unbundled executive is likely to perform better than the completely bundled executive structure attendant in the single executive regime. By better, we mean that the standard arguments used to justify a single strong unitary executive in the United States —accountability, energy, uniformity, coordination, and so on—actually justify a specific type of plural executive, not the single executive structure favored in Article II. Our thesis then is both unusual and controversial in that there has been virtually no serious theoretical challenge to the single executive structure for more than a century. The entire unitary executive debate assumes a cornerstone that we suggest is incorrect and consequential.

\(^1\) U.S. Const. art I, sec. 1 (“the executive Power shall be vested in a President of the Unites States of America”).

\(^2\) For example, Eldridge Gerry favored annexing a Council to the Executive. In general, participants in the Federal Convention were concerned that a single executive would trend towards monarchy on the one hand, but that a plural executive would lack sufficient energy and authority on the other. See generally 3 THE FOUNDERS CONSTITUTION 491-95 (PHILIP B. KURLAND & RALPH LERNER, EDS.) (collecting statements of convention members regarding single and plural executives).

\(^3\) J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 144 (J. Gough ed.1947) (arguing that not only should there only one executive but also a perpetual; Ellsworth, The Landholder, VI, in Essays on the Constitution 161, 163 (P. Ford ed. 1892) (“supreme executive should be one person, and unfettered otherwise than by the laws he is to execute”));

\(^4\) 1 WILLIAM BLACKSTONE, COMMENTARIES 242-43 (need for single Executive).

\(^5\) The Federalist 254 (No. 70 Hamilton) (C. Rossiter ed. 1961) (energy in single executive critical for security and steady implementation of laws).

The unbundled executive proposal has an air of absurdity to it with respect to federal law, but this basic structure is an existing feature of legions of state and local governments in the United States. Most states directly elect state attorneys general—as well as numerous other executive officers—and dividing executive authority does not usually produce any of the pathologies that critics of divided executives suggest. Prohibiting an executive from appointing cabinet members connotes a debilitating lack of coordination and efficiency. Yet, most state and local governments, whatever their faults, do not appear to be debilitated in this way. In reality, the closest empirical approximations to the unbundled executive in state and local governments seem to produce systematic shifts in public policy outcomes towards public preferences. Unbundling executive authority enhances democratic accountability and government performance; the plural executive regime does not cease to function.

This empirical regularity that unbundled executives produce political outcomes closer to public preferences has a natural and intuitive foundation in legal theory. An unbundled executive systematically reduces agency problems in representative government by enhancing accountability to national citizen constituencies. Unbundling executive authority reduces the risk of non-uniform implementation of federal law. And the unbundled executive would be as energetic and strong as a bundled executive. Put simply, the unbundled executive performs better along the very dimensions that are typically used to justify the single, strong, unitary executive structure that Article II articulates; that is, the unbundled executive outperforms the single unitary executive on its own turf.

Unbundling government authority does, however, also generate concrete costs, which we identify and discuss. We show how and why there can be too much unbundling of government authority. These costs, however, must be traded off against the gains in executive performance that our system would generate. While we think it implausible that executive authority should be entirely unbundled such that hundreds of executives would be directly elected, it is nearly as implausible that a single perfectly bundled executive represents the optimal executive structure. Given that this is, in fact, the current regime, some rethinking of executive authority is surely in order.

Modern legal theory is replete with detailed and careful analysis of the costs and benefits of centralizing or fragmenting authority across branches. The dispersion of power among the branches of government is a key organizing principle sounded loudly in the Federalist papers.

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8 See Christopher R. Berry & Jacob E. Gersen, The Fiscal Consequences of Electoral Institutions (unpublished manuscript 2008) (showing that jurisdictions with more directly elected governmental officials produce policies more in keeping with voter preferences).


10 See, e.g., Federalist 48 ("An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being
that also echoes throughout more modern and more ancient constitutional theory. \(^{11}\) There is, however, a comparative dearth of scholarship analyzing the internal allocation of authority within branches. \(^{12}\) This is unfortunate given that the internal structure of power within branches is likely to produce impacts on democratic governance that are at least as severe as cross-branch distributions.

To the extent that this theoretical space has been filled at all in recent years, it has been largely the unitary executive debate that occupied this terrain. \(^{13}\) Many pages in the law reviews and Supreme Court reporters have been filled with fights over what the Constitution permits and requires on this front; \(^{14}\) must the President have strong, weak, or complete hierarchical control over all administrative officials? \(^{15}\) What is the permissible structure that Congress may establish for relations between the President and administrative officials? \(^{16}\) May Congress restrict the
President’s ability to remove an officer appointed by the President? Does the President have the authority to negate the judgments of any and all administrative officials? Could the President unilaterally substitute her own judgment for that of any administrative official?

On one view, independent agencies—those headed by officials who cannot be removed by the President without good cause—are legally uncontroversial; on the other, they are an abomination clearly inconsistent with the explicit constitutional structure. This is a good and important debate as far as it goes; but as a matter of constitutional possibility, it is meager. Constitutional theory can be a bit more ambitious.

In the remainder of the paper, we articulate and defend our theory of the unbundled executive. We survey the theoretical debates about structuring executive authority and show how and why the unbundled executive performs better than a single unitary executive. Although our discussion is mainly conceptual, we draw on empirical evidence about how unbundled authority affects public policy whenever relevant. We clarify the relation between the unbundled executive and both current and historical debates in constitutional law. We also revisit the relevant debates about plural executive structures. Our work can, but need not, be read as an attack on many of the pragmatic justifications for a strong unitary executive. As such, the work is directly relevant to ongoing disputes about whether article II should be interpreted to require a unitary executive structure in addition to a single executive structure. These questions of numerosity and unitariness have been treated almost identically in the literature; in reality, they are conceptually distinct.

To be clear at the outset, we are adamantly not arguing that the U.S. Constitution does, in fact, establish a plural unbundled executive regime. But the sky might not fall if it did. Systems of plural or divided executives have long been ridiculed in constitutional theory. If our unbundling story is even plausible, there are a significant set of unappreciated benefits to some variants of plural executive regimes. Although we estimate the probability of institutional reform in the United States to be approximately zero, it would not be nearly as perverse as it first appears to design an unbundled executive. If so, taking steps within the given constitutional order to bring executive authority closer to the unbundled executive ideal could make for a better fit between institutional performance and constitutional values.

I. UNBUNDLING GOVERNMENT AUTHORITY

This Part provides a general conceptual overview of the unbundled executive. We explain the dynamics of unbundling authority in government, emphasizing the ways in which unbundled

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authority often enhances democratic accountability. We then provide some empirical institutional details about the extent of executive unbundling in state and local governments. Although our goals in this paper are mainly conceptual rather than empirical, unbundled authority is consistently associated with meaningful differences in policy outcomes in state and local government. The degree of unbundling in government matters not just in theory, but also in practice.

A. The Unbundled Executive in Theory

One of the obvious defining features of the U.S. Presidency is the national electoral constituency. The institutional design choice to make the President directly elected rather than selected by the legislature largely distinguishes the Presidential system from the parliamentary system. Direct electoral accountability to a national constituency is critical. Indeed, elections are often said to be the cornerstone of constitutional democracy.

Of course, any idealized view of elections as translating popular preferences into public policy has long-since faltered. Voter ignorance or information asymmetries often undermine the use of elections to control officials. The very notion of popular will to be translated into policy by officials is either incoherent or nonexistent. Public choice theory suggests a plethora of reasons to be dubious of most facets of the political process, including elections.

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20 See Jide Nzelbe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217 (2006) (arguing framers did not think the President would better represent nationalist interests than the Congress); James W. Ceaser, Presidential Selection: Theory and Development 47, 64 (1979) (describing the framers' vision of executive power.


22 See Dennis M. Simon, Presidents, Governors, and Electoral Accountability, 51 J. Politics 286, 286-87 (1989) (“According to this perspective, electoral accountability is imposed on a systemic or national basis through voting which is presidency-centered, retrospective, and result-based.”).


26 ANGUS CAMPBELL, ET AL. THE AMERICAN VOTER (1960) (documenting widespread lack of information and opinions about politics).


28 See generally DENNIS C. MUELLER, PUBLIC CHOICE III (Cambridge 2003) (modeling relationship between government structures, interest groups, and political behavior).
Chief among these is that the relationships between voters and politicians be they executives or legislators are riddled with agency problems. Because politicians will often have expertise that voters lack, politicians will have a significant degree of discretion. If voter information is worse than politician information, voters will often not be able to tell whether a policy that diverges from their own preferences diverges for good reasons (politician expertise) or bad reasons (divergent legislative preferences or self-interest). The agenda control exercised by elected officials may also allow politicians to enact policy that systematically diverges from voter preferences. So long as representatives propose a new policy that is far from voter preferences but less far than the status quo ante, voters may not be able to obtain desired policy outcomes. Elections help mange or mitigate these agency problems because elections provide a mechanism for voters both to select representatives that will take desirable actions, and sanction politicians who fail to enact policy consistent with voter preferences.

With respect to a democratic control of a national executive, elections are clearly an imperfect control mechanism. No employment schemes that we know of try to control workers by using a single hire-fire decision made every four years. Presidential elections every two years would provide greater public accountability than elections every four, but would also generate greater participation costs on the public. The extent of slack—divergence between public preferences and political decisions or behavior—varies as a function of electoral institutions. Our conceptual model holds constant electoral frequency, and instead restructures the executive authority that is regulated by elections. Specifically, we suggest there are many benefits from unbundling executive authority.

What would an unbundled executive look like? The basic idea is as follows. Suppose in a given jurisdiction there are \( j \) policy dimensions. On any given dimension, the executive can choose either a special interest-friendly policy or a voter-friendly policy. A majority of voters prefers the voter-friendly policy on each dimension. However, there is an interest group in each


31 James Fearon, Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in Democracy, Accountability, and Representation (Adam Przeworski, Susan Stokes, and Bernard Manin, eds. 1999).


domain that prefers the special-interest policy, and the group will provide a private benefit to the executive if the special interest’s preferred policy is enacted. This benefit may be a campaign contribution that the executive can use to improve her lot at election time or a bribe that can be used for private consumption. The executive would like to receive the side payments from the interest groups, but only if doing so will not cost her the next election.

Suppose there is only one single elected executive who has responsibility for all \( j \) policy dimensions. This is the “general purpose” executive familiar in the U.S. context; the single executive will be ascribed all the blame and all the credit for executive policy decisions, and rightly so. But because elections require voters to make a single elect-reject decision, the crudeness of the electoral sanction is a weak way for voters to control the single executive on any particular policy dimension. Voters must make a decision on a bundle of policy dimensions. As a result, the official can enact special interest-friendly policies in some dimensions, as long as she enacts voter-friendly policies on a sufficient number of dimensions to secure reelection. For general purpose executives, elections will not completely mitigate agency problems, though naturally they produce more policies that are close to majority voter preferences than would an electoral system without elections.

Contrast the general purpose (bundled) executive with the possibility of “special purpose” executives. Suppose there are only three important policy dimensions about which the public cares. Rather than elect one executive to oversee all of them, the jurisdiction elects three executives each of whom is responsible only for one of the policies. When one executive has exclusive responsibility for providing only a single policy, e.g., water or sanitation or defense, citizens need not aggregate judgments across multiple policy issues at election time. A vote for or against the special purpose executive summarizes voter preferences on a single policy dimension. An executive who enacts an interest-group-friendly policy in her single domain will not be able to placate voters with voter-friendly policies on other issues. Specialized elected executives therefore make elections more effective mechanisms for controlling officials; the greater the unbundling, the greater the mitigation of agency problems in government.\(^\ddagger\) In short, an unbundled executive is more democratically accountable than a single executive.

\(^\ddagger\) See generally ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000). The logic of issue unbundling has been applied sporadically in other settings. For example, one paper provides empirical support for the issue unbundling argument by contrasting elected and appointed utility regulators. Besley & Coate, supra note 33. Using panel data for US states, they find that elected regulators systematically enact more consumer-friendly policies than appointed regulators. The unbundling intuition has also been used to explain one of the benefits of citizen initiatives. See John G. Matsusaka, John G., Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years, 103 J. Pol. Econ. 587 (1995). For an extension of the implications of the direct democracy argument for the executive branch, see John G. Matsusaka, Direct Democracy and the Executive Branch (unpublished manuscript 2004). By unbundling a single issue from a legislative logroll—be it budgetary or policy—voters are thought to be able to better ensure outcomes close to majoritarian preferences for the given policy dimension. Id. This same theme is at play in the scattered assortment of justifications given for single-subject limitations in state constitutions, for instance in Colorado and Florida. Robert D. Cooter & Michael D. Gilbert, Chaos, Direct Democracy, and the Single Subject Rule (unpublished manuscript 2006); Michael D. Gilbert, Single Subject Rules and the Legislative Process, 67 U. PITT. L. REV. 803 (2006); Martha J. Dragich, State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 HARY. J. LEGISLATION 103 (2001). The single-subject limitation is supposed to preclude logrolls in which policies favored only by a minority of politicians or voters are enacted together. Michael Gilbert, Single Subject Rules and the Legislative Process, 67 U. PITT. L. REV. 803 (2006). The logic of unbundling then is general, and we are agnostic about whether unbundling in any particular instance is good or bad. In the single-subject context, logrolls could easily be welfare
If so, why not design an executive structure with hundreds of directly elected executives? There is a theoretical limit to the unbundling benefits that can be achieved by executive unbundling because there are costs produced by increasing the number of elected executives.\(^{35}\)

Consider two variants: monitoring costs and coordination costs. The addition of new elected executives produces an increase in monitoring costs. Each additional officer added to the ballot requires additional work on the part of voters. As the number of elected executives grows, the costs to citizens of monitoring a legion of public officials may outweigh any marginal benefits associated with issue unbundling.

Although monitoring costs might entail many issues, we focus on two components. The first is a function of the number of issues for which an executive provides policy. A voter has to determine whether each policy has been set at the level she prefers. This first component is a function of the number of aggregate policy dimensions and (importantly) largely independent from the number of elected executives. The second is a function of the number of elected executives rather than the number of overall issues. For each executive, the citizen must be able to identify the incumbent and assess her responsibility for a particular service or services.

Consider a random voter at the polls. On the ballot, she sees a list of offices, and for each office a list of names. The ballot often does not identify the incumbent, and in most cases it does not even list a political party affiliation.\(^{36}\) At a minimum, a voter must be able to identify the incumbent for each office and match the incumbent to an assessment of the service(s) performed by the office in question. Where there is only one general purpose executive, all services can be attributed to one official. The voter needs only to know which candidate is the incumbent and to form an overall assessment of the incumbent’s performance. Where there are many offices, the task becomes considerably more challenging. In practice, it is not at all unusual to find two dozen or more elected offices on a local government ballot. We use the term monitoring costs to denote the total effort required to evaluate all services in a jurisdiction and match them to the relevant incumbent officials.

In addition to monitoring costs, unbundling executive authority also produces coordination costs. When two similar policies are produced by different executive authorities without coordination, these policies might conflict or at least not work as well in tandem as might be the case if the policies were produced by a unified policymaker. For policies that are jointly produced by two specialized elected offices, these coordination costs will be most severe.

Some unbundling of executive authority should reduce slack, making policy more democratic. Too much unbundling could actually increase slack, allowing politicians to implement personal rather than public preferences. As monitoring costs increase, each elected executive might receive less scrutiny from voters. Officials governing specialized domains could enhancing so long as the value to the minority receiving benefits along each dimension is high enough. The point is merely that the idea of unbundling has been usefully applied in a handful of other legal and policy contexts.

\(^{35}\) Christopher R. Berry & Jacob E. Gersen, *The Fiscal Consequences of Electoral Institutions* (unpublished manuscript 2007).

then adopt special interest-friendly policies without suffering electoral reprisals. Similarly, for
certain subsets of policies, coordination costs could swamp democratic benefits.

When executive authority is unbundled and given solely to a specialized executive
directly elected by the public, this is the purest form of executive unbundling. The general
purpose executive now has responsibility for \( j-1 \) policy dimensions and the special purpose
official responsibility for one. There are, however, intermediate variants, involving different
appointments and removals schemes which produce more complicated tradeoffs.

Consider first a straightforward theoretical example. Suppose a specialized environment
executive is appointed by a general purpose executive. Environmental issues are partially
unbundled in the sense that one official exists who primarily oversees environmental policy.
However, because the choice of who to appoint and how to regulate, and when to remove is still
maintained by the general purpose executive, environmental issues are not perfectly unbundled.
Part of what makes the unbundled executive intuition attractive is that there is one executive with
exclusive authority to make decisions about one policy dimension. To the extent that the
authority to make final decisions is somewhat shared, the crispness of the pure scheme wanes.

The general purpose executive can obviously be disciplined by voters if, for example, she
selects a bad environment executive. But the general purpose executive would still be able to
appoint poor specialized executives on some dimensions, so long as policy was good enough on
a majority of dimensions. If the environment executive is directly elected, the reelection vote
only need summarize approval on one policy dimension. When executive authority is parceled
out to officials that are not directly elected then, things are significantly more unwieldy. Net
effects depend on whether the authority is exclusive or overlapping and whether the appointment
is vested entirely in the discretion of one institution or several.

Now consider the unwieldy empirical reality. The range of mechanisms for selecting
executive officials in the states is quite extensive.\(^{37}\) When appointment power is given to the
governor, sometimes no approval from another political institution is needed; sometimes the
senate must approve; sometimes both houses of the legislature must approve; sometimes either
house can approve; sometimes a board or council must approve; sometimes only a legislative
committee must do so. For certain offices, an agency head appoints without approval from
another institution; sometimes the governor must approve; sometimes the senate or a legislative
institution must do so. For other offices, a board or council appoints, subject to approval by the
governor and/or the senate. For still other offices, the legislature appoints administrative
officials.

These different appointment schemes also produce different degrees of unbundling and
therefore of public control over policy. If direct election of a special purpose executive official
results in the most unbundling, appointment of an official by one institution, be it the governor,
the legislature, or a state board or commission with the consent of another institution, where
policy jurisdiction is shared constitutes the least unbundling. In this case, not only can the
appointed official not be directly sanctioned by the public, but it is not clear which institution
should be punished for a bad appointment. Standard models of appointments emphasize that both

\(^{37}\) Any volume of the Book of the States contains multiple examples.
the nominating and the consenting institution will affect the selection and approval of officers.\textsuperscript{38} Without the ability to blame or credit a single elected official, public sanctions will be less effective. Moreover, when the appointed official shares authority for policy implementation with other officials or institutions, it is difficult to know who to blame for failure or credit for success. Appointment of executive officials with overlapping jurisdiction may be desirable for other reasons, but there is little in the way of unbundling benefits. Whereas unbundling by independent election \textit{clarifies} which public officials can be held responsible for which public policies, the hybrid appointment schemes \textit{muddle} responsibility. Indirect appointment schemes are less effective for controlling moral hazard in politics.\textsuperscript{39} Between these two extreme positions fall officials who are appointed by a single elected official (usually the governor) with exclusive policy authority (more unbundling) and officials who are appointed with the consent of multiple institutions with exclusive policy authority (less unbundling).

Democratic accountability or responsiveness is only one design consideration among many. However, it is a particularly prominent one in constitutional design. On this dimension of comparison, the analysis suggests that the unbundled executive outperforms the single executive. The unbundled executive produces greater accountability in the executive than the single completely bundled executive. We turn to other design considerations momentarily; however, we pause briefly to show that the unbundled executive is not merely a construct of scholarly imagination. Variants of unbundled executive regimes do exist in practice.

B. The Unbundled Executive in Practice

The Federal government does not rely on an unbundled executive structure, but state and local governments certainly do.\textsuperscript{40} Indeed, partial unbundling of executive authority is the norm rather than an exception in virtually all levels of non-national government units in the United


States, of which there are more than 80,000. Authority that the governor or mayor would otherwise exercise is frequently given to a specific state or local officer. Often these officers are directly elected by the public. Other times they are elected by the legislature; other times still, they are appointed by another state official. These arrangements are only approximations of the unbundled executive ideal because there is residual responsibility or authority for the policy in the general purpose executive. Still, as executive authority is even partially unbundled, and primary responsibility for specific policy domains is given to a directly elected official, policy outcomes should move closer to public preferences along that dimension. Both the general purpose and the special purpose executives should be more responsive to public preferences.

To give a sense of the institutional variation which we are describing, Table 1 presents aggregate measures from the Census of Government, revealing that there were nearly 19,000 elected officials in state governments as of 1992. Of these, members of state legislatures represented roughly 7,500 and members of other elected state boards accounted for another 1,300. The majority of state officials fell into the other category, comprising those individual elected offices outside any board or legislative body. The bulk of these are unbundled executives. Interestingly, the number of these independent elected officials grew spectacularly from 1967 to 1992, more than doubling from 4,200 to over 10,000. In comparison to the national government, it is perhaps startling that there are more elected state officials outside the state legislature than within it. This trend is new, emerging only within the past 40 years. Moreover, the variation in executive unbundling across states is, if anything, even more dramatic than the changes over time, as evidenced in Tables 2 and 3. There are only 80 state elected officials in Delaware, while there are 1,200 in Pennsylvania. As of 1992, New Jersey had only one elected official outside the state legislature (that is, the governor), whereas four other states—Texas, Pennsylvania, New York, and Florida—each had over 600 non-legislative elected officials.

Turning to the specific executive offices, Table 4 shows that the governor is the only position that is elected in every state. The attorney general is elected in 43, while the treasurer and secretary of state are each elected in 38 states, as of 2002. Beyond these familiar offices, a number of more obscure executive positions are elected in a handful of states. For instance, utility regulators, education commissioners, and comptrollers are elected in less than half the states, while the adjutant general is elected in only one. Comparing the figures for 1977 and 2002, we see the emergence of several new elected executive offices within the past quarter century. Banking regulators, election administrators, finance offices, and community affairs representatives all joined the ranks of state elected officials for the first time during this period.

Individual states show substantial differences in the extent of electoral unbundling of the executive branch (Table 5). Of the 22 executive offices that were elected in at least one state, there is no single state in which more than half of these different offices are elected. Maine, New Hampshire, and New Jersey stand out as the only states in which the governor is the sole elected executive officer. At the other extreme, 5 states—Florida, Idaho, North Dakota, South Carolina, and Washington—each hold elections for 11 different executive offices. The average number of elected executive offices per state was 6.7 in 2002, up from 6 in 1977. All told then, state and local governments unbundle executive authority to a significant degree, at least when compared to the complete bundling that occurs in the Federal government.
Elsewhere, we have estimated the impact of different degrees of executive unbundling on public policy.41 Using various measures of unbundling, different estimation techniques, and different data sources, the extent of unbundling consistently produces differences in policy outcomes. This is true not only from jurisdiction to jurisdiction, but also within a political jurisdiction over time. Some unbundling produces outcomes closer to public preferences and too much unbundling produces more slack. The result holds not only for state government, but also for local government structures. This simple empirical result has far-reaching implications for institutional design and constitutional theory.42

II. EXECUTIVE DESIGN PRINCIPLES & PROBLEMS

A. Background

Our model of an unbundled executive is closely related to two debates in constitutional theory, one active and one dormant. Rather than analyze the costs and benefits of the unbundled executive in isolation, we rely on these disputes as lens through which to view the unbundled executive model.

The dormant dispute is whether there should be a single or plural executive. These executive numerosity questions are dormant with good reason. The U.S. Constitution clearly resolves it in favor of the single executive. In other times and places, this question has been resolved otherwise, and our work suggests the single executive position is not the only tenable one. Elsewhere there is far more variation in the way that executive authority is structured. In ancient Rome, there was a dual magistracy.43 Andorra is technically structured as a duumvirate, ruled by two co-princes.44 These arrangements are obviously somewhat different from the pure version of an unbundled executive, but comparative contexts do show far more variation.

The second more active dispute is whether the single executive should have strong or weak hierarchical (vertical) control over the execution or administration of law. Does and should the Constitution establish strong vertical or hierarchical control by the President over all officials that implement federal law? Properly cabined, this is or should be the key question in the unitary executive debate.

A critical additional question only becomes intelligible if the numerosity question is resolved in favor of multiple executives. Given multiple executives, should their authority be concurrent, partially overlapping, or exclusive vis-à-vis each other. The single versus plural debate generally assumes that multiple executives must exercise overlapping authority, and for this reason conclude the arrangement produces ineffective or inefficient government. This assumption is defensible on historical grounds because most plural executives were councils, the

41 Berry & Gersen, Fiscal Consequences, supra note 8.
members of which shared concurrent authority. Once the assumption of overlapping authority is relaxed, however, the force of many standard critiques of plural executive systems wanes.

One reason the unbundled executive appears startling is that these separate analytic questions have become conflated. If the single-plural question has been resolved in favor of one executive, the unbundling question seems nonsensical. If executive authority can only be overlapping, then a plural executive looks ineffective. If one favors a strong unitary executive, any plural system first looks unappealing because authority that is not centralized tends to be weak. Thus, in this section, we try to keep these dimensions of potential institutional choice distinct, matching existing critiques and intuitions to the relevant dimension.

We emphasize two claims throughout this section. First, any general criticism of plural or unbundled executives must somewhat reconcile dire predictions about government failure that would derive from a plural executive and the reality of successful state governments in the United States. It is possible that state and local governments would be even better without unbundled authority, but it is uncharitable in the extreme to describe all unbundled state governments as completely dysfunctional. Second, there is an essential difference between unbundled authority and concurrent authority as we will show. The most prominent critiques of the plural executive model target schemes in which several executives act in consort with overlapping authority. Such schemes may well produce government dysfunction, unaccountability, or trend towards tyranny, but the unbundled executive does not.

B. Executives, Single and Plural

The reasons that a plural executive regime was rejected and a single executive regime embraced are many. But there are only a handful of recurrent themes that truly dominate this debate. First and foremost is a suggestion that single executives are democratically accountable; plural executives are not. As we have now repeatedly suggested, this is simply a mistake deriving from confusion about what features of plural executives are necessary and which are merely common. Single executives are also said to be better at providing uniformity and coordination in the implementation of law.45 Single executives are often to be required by the inherent nature of policy issues that constitute important cores of executive authority, like war and trade. A common suggestion in the convention era debates was that only a single executive could provide the energy strength, and agility necessary to sustain the fledgling executive branch; another, that something inherent in the notion of separation of powers requires a single executive.46 Each of these ideas has an intuitive superficial appeal, but each is also wrong, or at least not quite right. Along virtually all of these dimensions the unbundled executive performs as well or better than the single executive. When considered as a whole, rather than dimension by dimension, the case for the unbundled executive is all the stronger. Our discussion no doubt loses much of the nuance in these complex debates. Nonetheless, we attempt to address the most common collection of relevant ideas and arguments related to numerosity and unitariness.

45 Lessig & Sunstein, supra note 16.

46 See Calabresi, supra note 16. Although Calabresi is focused on the question of executive unitariness rather than singularity, most of these ideas were levied against plural executives. The application to unitariness is probably the extension rather than vice versa.
1. Accountability

The most frequent argument in favor of a single and strong executive has to do with democratic accountability. The President is the only elected official with a truly national constituency. Multiple executives would create confusion and ambiguity about which officials were responsible for what policy. The same claim is made with respect to independent agencies in the unitary executive debate. The inability to impose electoral sanctions would undermine the democratic process, debilitating the ability of voters to select and discipline politicians, or so the argument goes. Hamilton articulated this idea with some force:

But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is that it tends to conceal faults and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.47

Whether or not this passage supports the strong unitary executive vision as it is sometimes taken to do,48 it clearly favors a single rather than plural executive. The underlying ideas are intuitive and the rhetoric powerful, but in our view, the central claim is simply incorrect. It assumes a plural executive must entail overlapping or concurrent authority rather than exclusive authority. When multiple parties share authority, it may in fact be difficult to assign blame or credit. But as noted above, the single versus plural executive dimension is conceptually distinct from the overlapping versus exclusive jurisdiction dimension.49 In theory at least, it is straightforward to construct a plural executive with exclusive authority or jurisdiction. Our model of the unbundled executive does just that.

True, as a historical matter, the multiple executive structures of which we are aware usually did entail overlapping authority, and therefore, this slippage is understandable. It is also true that when authority for a policy is given to many actors, none of whom is clearly in control, it will be difficult for voters to blame any single official and impose electoral sanctions accordingly. This idea from No. 70 was echoed elsewhere in the convention era debates, along with familiar claims about shirking and free riding in multi-member bodies. “We well know what numerous executives are. We know there is neither vigor, decision, nor responsibility, in

47 Id.

49 Cf. Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 SUP. CT. REV. 201 (2007) (clarifying the distinction between overlapping, concurrent, and exclusive agency authority in the context of administrative law).
them.”\textsuperscript{50} These arguments were offered again and again against those who favored executive councils. Indeed, this is part of the difficulty with using elections to sanction officials in the legislative branch: it is a multi-member body and when multi-member bodies fail, parsing responsibility is difficult.

The simple difference between the unbundled executive on the one hand, and the typical plural executive critiqued by political and legal theorists on the other, is that the former involves (more or less) exclusive authority of the individual executives, while the latter entails (more or less) overlapping authority. The unbundled executive would involve parceling it out to well-identified and directly elected officials, which facilitates rather than undermines the democratic process—clarifying authority rather than ambiguating it. To reiterate an earlier point, a vote for or against a Presidential candidate is remarkably crude; it is a weighted average of voter approval of dozens if not hundreds of policy dimensions. A vote for or against an elected Secretary of Education is less so. Directly electing one official to oversee one policy does not obviously create more democratic slack than electing one official to oversee hundreds of policies. So long as unbundling is coupled with exclusive authority within a jurisdiction, the unbundled executive is preferable on accountability grounds.

2. Functional Duties & Single Executives

Even if the unbundled executive serves state and local governments well, maybe the characteristics of the national presidency differ in critical ways. For example, one frequent assertion is that functional characteristics of the national presidency demand that one single individual have all executive authority. Governors, for example, do not manage armed conflicts or foreign policy; they do not negotiate with other sovereign states. When war and peace are at stake, it is especially important that the country speak with one voice capable of quick and decisive action. In the same way that spreading across multiple institutions slows the pace of action when a rapid response is required, dispersing this authority among multiple executives does so as well. Controlling militaries and dealing with war requires a single strong executive.\textsuperscript{52}

To start with, we note a minor historical point. In the 1700s, the single versus plural executive issue was distinct from whether the executive should have authority to make war or peace (exclusively or concurrently). Pickney, for example, favored a single vigorous executive, but did not want the executive power to entail authority to make war and peace.\textsuperscript{53} A single executive did not necessarily imply the power to make wars; the power to make war did not necessarily prohibit a plural executive. Others favored an independent but plural executive.\textsuperscript{54}

\textsuperscript{50} James Wilson, Pennsylvania Ratifying Convention (4 Dec. 1787), Elliot 2:480 (excerpted at \textsc{The Founders Constitution}, supra note \textsc{Error! Bookmark not defined.}, at 501).

\textsuperscript{51} Cf. \textsc{Eric A. Posner & Adrian Vermeule}, \textsc{Terror in the Balance} (2007).

\textsuperscript{52} See Saikrishna B. Prakash & Michael D. Ramsey, \textsc{The Executive Power Over Foreign Affairs}, 111 \textsc{Yale L. J.} 231 (2001).

\textsuperscript{53} See Records of the Federal Convention, 1:64, 68, Madison, 1 June (“Mr. Pickney was for a virgorous Executive but was afraid the Executive powers of the existing Congress might extend to peace & war &c which would render the Executive a monarchy, of the worst kind, towit an elective one.”).

\textsuperscript{54} See, e.g., \textsc{4 The Complete Anti-Federalist} 60 (Herberg J. Storing, ed., 1981) (view of William Symmes). See generally \textsc{Calabresi & Prakash, supra} note 16, at 604-06.
These questions are related, of course, but one does not dictate the other, either as a matter of theory or history.

Nonetheless, suppose we assume foreign relations as a policy issue does require that a single individual exercise ultimate control, and that being commander in chief is similar in this respect. Nothing in this view implies that a single executive should have control over all executive authority. It means only that each individual policy of this sort should be controlled by one executive official. The claims about rapid response or speaking with one voice—even if correct—mean only one executive officer should have exclusive policy jurisdiction in the relevant domain; they support a single executive within a policy dimension, but not necessarily across policy dimensions.

The critical question from the unbundled executive perspective is whether one single individual should have authority over this entire set of executive policies. To give a purely hypothetical example, it is easy to imagine a case in which voters might wish to remove, say, the Secretary of Defense over the conduct of a failed war without at the same time replacing the President. When the two offices are bundled together under a unitary executive, voters must make a single elect-reject decision in the presidential election. If the Secretary of Defense were directly elected, voters could express displeasure over the war without throwing out a President who was succeeding on many other dimensions. This confusion about the relationship between numerosity and exclusivity in government authority are common; the unbundled executive helps clarify matters, or so we hope.

3. Energy

Energy is another important principle used to support both the single executive and later the unitary executive.\textsuperscript{55} Many of the framers were explicitly concerned with designing a national executive with sufficient energy, fearing a national government that was too weak would crumble. In Federalist No. 37, for example, Madison argued that “[e]nergy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government.”\textsuperscript{56} Hamilton went further:

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.”\textsuperscript{57}

The trouble with this view is that there is slippage between the claim that one individual with control over one policy will be optimally energetic and the conclusion that one individual with control over all relevant policies will be optimally energetic. We are aware of no especially compelling reason that a single executive with authority over \textit{j} policy dimensions would be more

\textsuperscript{55} Calaresi, \textit{supra} note 16.

\textsuperscript{56} THE \textit{FEDERALIST} NO. 37 (Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{57} THE \textit{FEDERALIST} NO. 70 (Hamilton) (Clinton Rossiter ed., 1961).
energetic—in the parlance of the founders—than $k$ executives each of whom has exclusive responsibility for one dimension. If the claim were correct, then legions of state and local governments are “suboptimal” on the energy dimension. Perhaps so, but the extent of state and local government failure is not particularly high. If the U.S. states constitute fifty data points of government continuity and the national government one, it seems odd to conclude that the fifty have insufficiently energetic governments, and the one does not.

More plausible is that there is something akin to economies of scale in executive authority, which makes control of $j$ policy dimensions by one executive more efficient than control by $k$ executives. If so, then it is suboptimal to entirely unbundle executive authority, but we have already said as much above. Moreover, just as the corner solution of complete unbundling is unlikely to be optimal, so too is the opposite corner solution of no unbundling. More likely, at least in our view, is that the relevant economies of scale suggest that some executive unbundling is better than none or all.

4. Balance of Powers

If energy alone does not justify a single executive, perhaps the background separation of powers in the constitutional structure does indirectly. In order for each branch to guard against infractions by the others, maybe a single executive is required. One idea on this front is historical: because of the inherent weakness of the President and the relative strength of the legislature during the founding era, institutional features needed to be calibrated to ensure a balance between the two. For example, bicameralism was necessary to weaken the legislative branch and a strong single and unitary executive was needed to strengthen the President to create rough parity.58

The problems with this view are extensive. A first mistake is conceptual, equating strength with a lack of numerosity. Three executives who cannot agree are surely weaker than one executive, but three executives of similar mind, acting in consort, are not obviously so. If anything, they would seem as strong as or stronger than one executive. Alternatively, claiming the founders worked ardently to strengthen the executive borders on disingenuous. Some sought a strong executive and favored a single executive for that reason; others were concerned that a single executive naturally trends towards monarchy, a result to be avoided.59 Indeed, the ideas seem an odd overlay to inter-branch relations in the 1700s. The President had comparatively narrow authority and resources: granting one President strong hierarchical control over virtually nothing seems a peculiar corrective to concerns about a too-powerful Congress.

Alternatively, perhaps the relevant claim is that a single executive is necessary to protect against incursions by an aggressive legislature. Balance of powers would be one criterion here, but not the only one. The real question is how well a given executive structure would be able to

58 Id.
59 See 1 THE FOUNDERS CONSTITUTION 64, 68, supra note Error! Bookmark not defined. (quoting report of Madison, 1 June) (“Mr. Randolph strenuously opposed a unity in the Executive magistracy. He regarded it as the foetus of monarchy.”). On the other hand, there was skepticism about growth of authority of a plural executive as well. See id. 1:74; Pierce, June 2) (“Mr. Wilson said that in his opinion so far from a unity of the Executive tending to progress towards a monarchy it would be the circumstance to prevent it. A plurality in the Executive of Government would probably produce a tyranny as bad as the thirty Tyrants of Athens, or as the Decemvirs of Rome.”).
patrol and protect the borders of its authority. The trouble for the single executive view is that particularly good reason to suspect a single executive would more aggressively protect her purview over $j$ policy dimensions, than would $k$ executives each of whom has responsibility for a single policy dimension. If anything, unbundling authority in this way might create stronger incentives for protecting turf because the proportional losses to a given executive would be greater from Congressional incursion. In general form, the single executive view suggests grounds would be better patrolled by one guard than a dozen simply because the average energy exerted would be lower in the plural setting; the relevant criterion of course is the aggregate energy and it would be altogether surprising if plurals did not do better on this front than one.

5. Uniformity

What of other values that a single executive is supposed to serve? “A strong unitary executive can promote important values of accountability, coordination, and uniformity in the execution of laws, and to whatever extent these were the framers’ values, they are certainly now ours.”60 We have already suggested that the unbundled executive is preferable on accountability grounds, but what about coordination and uniformity in a world of unbundled executive authority?

Properly cabined, the legal value of uniformity concerns the similar application of one legal principle in many different settings. That is, uniformity is about consistent application of law within a policy dimension. Serving the interests of uniformity is sometimes said to require a single executive, a unitary executive, or both. A single executive without unitary hierarchical control might not be able ensure that different subordinates always apply the law in identical or at least similar ways. In the same way, multiple executives might obviously apply or implement the same law in different ways in different contexts or to different people. In either case, uniformity would be undermined and faith in the rule of law sacrificed.

Again however, the assumption of overlapping authority obfuscates matters. The unbundled executive framework starts with the premise that policy responsibility can be taken away from a general purpose executive and given to a special purpose elected official. No doubt this is something of an abstraction, but it is important to distinguish principled objections from practical objections. If policy can be distributed in this way, then uniformity is no longer an objection. Multiple executives with concurrent jurisdiction might produce a lack of uniformity, but multiple executives with exclusive jurisdiction would not—or at least would do so no more or no less than a single executive.

In point of fact, there is likely to be even greater uniformity in the unbundled executive scheme. Why? In the single bundled executive structure, there is ultimately one person who must ensure the uniform implementation of federal law across dozens or even hundreds of different policy domains. The best case scenario is that this is enormously difficult and costly; the worst case scenario is that it borders on impossible. In the unbundled executive scheme, one executive must ensure the uniform implementation and application of federal law in a single domain. This is hard as well, but it is an order of magnitude less difficult than in the bundled regime. Moreover, the residual general purpose executive who must ensure uniformity in many policy domains (in the partially unbundled world) must now do so for a subset of the total set of policy

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60 Lessig & Sunstein, supra note 16, at 2.
domains. The costs of doing so may still be substantial, but they are strictly lower than those faced by the general executive in the bundled regime. General purpose executives must by their nature focus on an expansive list of policies; specialized purpose executives need focus on only one. This is flip-side of the “blinders” or “tunnel-vision” problem that agencies with a single mission sometimes have in regulatory policy.\footnote{See Stephen G. Breyer, \textit{Breaking the Vicious Circle: Toward Effective Risk Regulation} 11 (Harvard 1993).} Importantly, institutional designers who care a great deal about uniformity might well prefer strong unitary hierarchical control for each executive within their domain, a point which we are agnostic about. Ensuring intra-policy uniformity, however, does not require a single executive.

\textit{6. Coordination}

The concern about coordination, in our view, is quite different from uniformity in that it focuses on \textit{inter-policy} effects rather than \textit{intra-policy} effects as uniformity does. The simple underlying claim is that a single strong executive will be better able to coordinate related policies and make sensible tradeoffs across those policies. If coordination is the overriding principle of government organization, then the unbundled executive is likely worse than a single strong unitary executive. Although we are open to clever counterarguments, we will assume that a single executive with responsibility for \( k \) policy dimensions will be better able to coordinate across dimensions. If inter-policy coordination is more important than accountability, uniformity, energy, or efficiency, then institutional designers should reject the unbundled executive. If coordination is one value among many, then the calculus is far more complicated, and does not obviously disfavor the unbundled model.

Although coordination is a laudable goal, it is also worth noting that Congress has enacted, the President has signed, and the Supreme Court has upheld a series of institutional arrangements that are arguably inconsistent with the strong unitary executive position. Although these cases have generated enormous debate, current doctrine upholds as constitutional independent prosecutors,\footnote{See \textit{Morrison v. Olson}, 487 U.S. 654 (1988).} and the insulation of agency heads that are not pure or core executive officers from plenary Presidential control.\footnote{See \textit{Mistretta v. United States}, 488 U.S. 361 (1989); \textit{United States v. Nixon}, 418 U.S. 683 (1974); \textit{Wiener v. United States}, 357 U.S. 349 (1958); \textit{Humphrey’s Executor v. United States}, 295 U.S. 602 (1935). \textit{But see Myers v. United States}, 272 U.S. 52 (1926).} The Constitution, as applied, has already sacrificed the pure goal of coordination in the service of other competing principles.

We will leave the debate about whether this is desirable to others. Still, compared to the current state of affairs, the unbundled executive is likely superior on inter-policy coordination grounds. The ultimate principal—the public—would select and sanction each of the specialized executives. This arrangement gives the public better mechanisms for ensuring inter-policy coordination compared with a system in which the President appoints but cannot remove agency heads. Thus, as a comparative matter, the unbundled executive might be preferable on coordination grounds to the current state of affairs, even if a strong unitary executive with plenary control of the administration would be a first-best alternative along this one dimension.
C. Strong Unitarians & Unbundled Executives

The unitary executive fight is often miscast in politics and the media. In constitutional law it has little to do with the breadth of Presidential authority. Although many constitutional theorists have strong views about how broad executive authority is or should be, we abstract away from this debate entirely. Whatever one’s view about the proper scope of executive authority, there is always a subsequent question about how that authority should be optimally structured. A constitution could establish a plural executive with broad authority or a unitary executive with narrow authority. A constitution could unbundle executive authority irrespective of whether the stock of executive authority is a lot or a little.

Properly understood, the unitary executive debate is simply about the extent of hierarchical control over executive or administrative officers that the Constitution establishes. In the U.S. context virtually everyone favors a unitary executive of one sort or another. The key distinction is between “strong” unitary executives and “weak” unitary executives. There are many nuances in individual views within various camps, but strong unitary executive types tend to believe that Congress cannot insulate administrative officers from Presidential control, for example, by only allowing removal for cause. Weak unitary executives tend to believe that the President must have plenary control over certain principal purely executive officers, but that officers who exercise authority that is not purely executive can be insulated to a greater or lesser extent.

To over-simplify just a bit, there are two main types of justifications for a strong unitary executive. The first is historical or originalist: because the constitutional structure would have been understood at the time of the founding to create a strong unitary executive, that is the meaning that the constitution should be given. The second is more or less consequentialist.

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64 The Supreme Court has said that Congress may not restrict the President’s ability to remove purely executive officers. Myers v. United States, 272 U.S. 52 (1926). Congress may not reserve for itself the authority to remove an executive officer by means other than impeachment. It is also apparently not permissible for Congress to specify a list of potential nominees from which the President may choose. It is not clear that no variant of this arrangement would be constitutional. However, the list-method an combination with other features of the appointment and authority scheme was rejected in _Hechinger v. Metropolitan Washington Airports Authority_, 36 F.3d 97 (D.C. Cir. 1994). The Supreme Court rejected a similar scheme in _Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc._, 501 U.S. 252 (1991). See generally Jack M. Beermann, _Congressional Administration_, 43 San. Diego L. Rev. 61 (2006). But this default appointment and removal scheme does not begin to constitute the full range of possibilities, either theoretically or empirically. Suppose Congress were given the authority to appoint members of the President’s cabinet or other agency heads. Alternatively, suppose the legislature was given no role in the appointment of these officials; either the President might select unilaterally or the nominee might be subject to confirmation by another political institution, perhaps a nonpartisan board or commission.


66 See Lessig & Sunstein, supra note 16.

67 Id.

68 See _e.g._, Steven G. Galabresi & Saikrishna B. Prakash, _The President’s Power to Executive the Laws_, 104 YALE L. J. 541 (1994).
Because of other shifts in government behavior and social development, a strong unitary executive is laudable because it would help support a desirable constitutional structure.\(^{70}\)

As should be evident by now, there is much overlap between the justifications for a unitary executive and justifications for a single executive. Therefore many of the normative justifications for the strong unitary executive position are natural counter-points to our model of an unbundled executive. Although we suspect that most strong unitary executives would oppose the unbundled executive, in our view the positions are not conceptually inconsistent, at least setting aside the originalist or historical justification. To the extent that one favors strong hierarchical control of executive subordinates, it is possible to favor an unbundled executive in which each executive exerts complete vertical control. Each unbundled executive could remove subordinates at will, veto policy judgments, or even substitute his own judgment in lieu of the subordinate officer’s.

We have said nothing about whether this strong form of vertical control is desirable or not. If it is (according to some external theory of executive authority), one could favor a strong unitary unbundled executive system. If not, one could favor a weak unitary unbundled executive system. Executive authority would be unbundled, but independent agencies and officers would still exist. The modest conceptual point is that the degree of vertical control of an executive over subordinates is distinct from the existence or extent of unbundling in the executive. Moreover, if we are correct that the unbundled executive better serves the underlying principles that unitary executives claim as their own, the case for the unbundled executive is all the stronger.

There is a sense, however, in which the unbundled executive is at least in tension with the unitary executive position. A dominant, if not the dominant pragmatic justification for a unitary executive is that only a single executive with control over all implementation of federal law is democratically accountable. Insofar as this is merely a claim that a single unitary executive is more democratically accountable than a single executive combined with independent agencies, it could—but need not—be right.\(^{71}\) Insofar as it is a statement that a single unitary is more accountability than any divided or plural executive structure, we obviously disagree. The partially unbundled executive should produce greater accountability than the single unitary executive vision.

D. Weak Unitarians and Unbundling

To this point, we have suggested that unitary executive types should actually prefer (or at least not despise) the unbundled executive regime because it performs as well or better along the very dimensions that supposedly justify a single unitary executive. While the unitary executive camp is vocal, it is probably wrong to describe it as a majority position, either in academia or

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\(^{70}\) See, e.g., Lessig & Sunstein, *supra* note 16; Flaherty, *supra* note 16.

\(^{71}\) See Stephenson, *supra* note 92.
politics. What of weak unitary executive types, who are willing to tolerate if not embrace independent agencies and/or officers who the President cannot remove except for cause?72

Again, properly understood the unitary executive camp is mainly concerned with vertical control and therefore one can favor the unbundled executive independent of one’s views on unitary structure. Nonetheless, to the extent that weak unitary executives support many of the same principles that strong unitary executives do, all that we have said above applies here as well. What is different for weak unitary executives is support for a lack of complete presidential control over some administrative officers. This position could mean (a) some agencies or officers should be beyond the control of any executive or (b) some agencies or officers should be beyond the control of the executive or one executive.

This ambiguity is not usually evidenced, because in the U.S. system, we only have one President. But once the possibility of several executives is one the table, there is some vagueness in the weak unitary executive position. For example, suppose one favors an independent member of the Federal Election Commission or the National Labor Relations Board, where independent means only that the President cannot remove a commissioner without cause. If one likes independence because it insulates policy decisions from voters (by weakening presidential control), then having a directly elected Labor Executive or Election Executive who makes those policy decisions will look unattractive. Unbundling gives greater control to voters, which (by assumption) is a state of affairs to be avoided. By the same token, if the role of an executive is “selection” of independent board members or commissioners, this could be accomplished with an unbundled executive regime as well. The directly elected Labor executive would appoint NLRB members who would then only be removable for cause. This is an example of a hybrid unbundling and insulation regime.73

We have resisted making any claims about the desirability of political insulation, but if, according to some external theory of good governance, political insulation is desirable, the unbundled executive regime is flexible enough to accomplish it. Moreover, the unbundled Labor Executive is likely to have more policy-specific expertise and therefore also likely to select better commissioners, which could in turn increase the average quality of decision-makers. Alternatively, if one favors independent agencies in the current system because some policy decisions should be made by actors with local policy expertise who are not subject to generalist political pressure, then conceivably one might prefer unbundled executives without political insulation. Such commissioners would be either directly elected by the public or more likely selected by a directly elected executive, who could then remove them for any reason or no reason at all, much like the at will employee. Again, the unbundled executive regime would seem to serve those interests as well as or better than then independent officer compromise.


E. Unbundling, Concentration, & Dispersion

Although advocates of a strong executive are many, there is also a storied tradition in political theory and law that is suspicious of the concentration of authority in one institutional actor like the President, or more apropos an even stronger executive like a dictator. Dispersing authority among multiple institutions is generally thought to be one the key strengths of the U.S. separation of powers system. By requiring multiple institutions or political actors to sign on to controversial government actions, dispersing government authority allegedly protects citizens. The dark side of dispersion, long appreciated, is that the benefits of efficiency and speed (and perhaps expertise) are forgone. As a matter of institutional design, there is obviously a tradeoff between these values; precisely what the optimal balance is will depend on time and place. Many debates about the structure of executive authority are cast in terms of the centralization of authority. This is true of the federal United States context, but it is also true of the comparative literature and some very early work on state government structure in the 1950’s and 1960’s. Political scientists and lawyers have long studied how different constitutional structures, for example, presidential versus parliamentary systems, produce different political outcomes, like competition and stability. More recently, economists have estimated the effect of different constitutional structures on economic policy, development, taxing, or spending.

What of these scholars who distrust the centralization of authority? How should they receive the unbundled executive? Whether this group of scholars should favor the unbundled executive depends on precisely what is to be accomplished by decentralizing authority. This is not always fleshed out with sufficient clarity, but one camp seems to be concerned with the sum of all power than is given to one executive or government official. Too much centralization, on this view, really implies too much power in one place. For supporters of this position, our theory has much to recommend it. By definition, the unbundled executive regime carves up general

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74 The concentration versus dispersion theme also has close parallels in work on redundancy in bureaucratic organizations. See Anne Joseph O’Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 CAL. L. REV. 1655 (2006)


76 Cf. Flaherty, supra note 16.


executive authority and gives exclusively to different executive officers. By definition, the aggregate executive power held by any one individual in our regime is less than the aggregate executive power held by any individual in the single executive regime. The unbundled executive is as good as any other fragmentation scheme in this regard, and potentially much better.

An alternative understanding of executive fragmentation, however, is concerned not so much with aggregate authority, but with the lack of veto-points that a single centralized executive must negotiate. It is not that one executive can exercise power over a lot of things, but that one executive can exercise power over the objection of any other government officials. When these scholars advocate fragmentation, they are really advocating councils or committees—multi-member decision-making bodies—the consent of all or most of which is necessary for action. Although we think this is not the majority position in the fragmentation literature, if one holds this view, the unbundled executive is not likely to be (much) more attractive than the current regime. To see why recall that exclusive policy authority within a domain is a critical element of the unbundled executive model. It is a lack of consent from other executives that supports greater accountability in the model. That said, the unbundled executive is no worse from this perspective than the current regime and to the extent that any background concerns about the centralization of too much power in one place linger in the shadows, the unbundled executive might still be preferred on those grounds.

We hope it is clear by now that the unbundled executive does both more and less than avoiding the concentration of executive authority. It does less in the sense that an unbundled executive could have extremely broad authority say to act in the field of national defense without assent from other political institutions. The unbundled executive does more than simply disperse authority because it enhances democratic control over both the specialized executive and the generalized executive. It does not make it harder for unbundled executives to act, but it does make it easier for the public to monitor and sanction those actions.

F. Selection Effects

We have focused almost exclusively on incentive effects: how does the unbundling executive authority alter the behavior of executives? An equally important question, however, is whether the unbundled executive would generate selection effects. Would an unbundled plural executive scheme attract or select different candidates to executive positions and would any changes be normatively attractive? The dynamics that generate such effects are likely to be complex and we do not want to present a false sense of certainty. Nonetheless, some tentative observations are warranted.

It is possible, but we think unlikely, that the unbundled executive would produce no selection effects. In this world, all the unbundled executives would essentially the same as the single bundled executive looks. For this to occur there would have to be near perfect overlap

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82 James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance*, in *Democracy, Accountability, and Representation* (Manin, Przeworski, & Stokes, eds. 1999). In political science, it has now become the norm to emphasize selection effects of elections instead of sanctioning effects. We focus on both types of effects with respect to executive officials as both seem crucial for any sensible regime of executive structure.
in the characteristics that make for a good executive across all policy domains. That is, the same attributes that would for a good Education Executive would have to make for a good War Powers Executive. No doubt, there will be some overlap—for example the ability to inspire. But the characteristics that make one a good war time leader are not necessarily those that make for a good peace time leader. The greater the overlap across domains, the less the selection benefit of the unbundled executive. If that is correct, then the unbundled executive regime would produce some executives that have attributes quite different from the general purpose executive, which means we need to know more about the direction of the effects to make a normative evaluation.

How would the unbundled executive regime attract a different population of potential executive candidates to run for executive office? Suppose potential Presidential candidates are attracted to the possibility of being the leader of the free world rather than one of a handful of leaders of the free world. In that case perhaps the unbundled executive would drive some candidates from executive elections. This is a possible effect, but if it exists it tends to support rather than undermine our case.

First, it is not at all clear that having six unbundled executives would make the office(s) significantly less attractive to qualified applicants. Those that run for President in the United States are often former Senators, Representatives, and governors. If the potential candidates came from Congress, the prospect of being one of many powerful national leaders was not a sufficient disincentive to drive them from public life. If the candidate were a former governor, recall that most state executives are already somewhat unbundled. If unbundling in the state government context nonetheless attracted high quality candidates to public life, we are hard pressed to see why unbundling in the national government context would not do so. Of course, perhaps part of what makes serving in the U.S. Congress or state governorships attractive is the possibility of moving on to higher office; maybe if the Presidency were unbundled even those offices would be less attractive? This view borders on the absurd. The probability of winning the Presidency is sufficiently small for any senator, congressman, or state governor, that adjusting such incentives is not likely to have much effect.

It is often said that governors make good presidents because they have prior executive experience. The unbundled executive regime would produce a larger pool of candidates with some executive experience in national government; perhaps this would make presidential races more competitive and drive ever stronger candidates. In countries where the chief government executive is significantly weaker than the President is in the United States, it simply does not appear that lower quality politicians serve. Surely Margaret Thatcher and Tony Blair were of roughly similar caliber to William Clinton and Ronald Reagan. It is hard to see an obvious trend as to intellect, strength, and leadership, as a function of Presidential versus Parliamentary systems.

All that said, if the unbundled executive does attract a different pool of candidates to run for office, it is hard to imagine that the new pool would be of systematically lower quality. To make any headway on this problem, we need to know whether the unbundled executive reduces

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83 In fact, it seems likely the constraint of only selecting one executive has created an artificial tradeoff between policy dimensions like these. The unbundled executive regime would reduce some of these necessary tradeoffs, likely producing more effective military executives and more effective domestic policy executives, or so we argue.
the probability of selecting the truly great executive (the top part the potential executive distribution), reduces the probability of screening out the worst executives (eliminating the bottom portion of the distribution), and raises or lowers the median or average executive elected. The worst case scenario would be to design a system that screens out the best executives and selects the worst.

The candidates who would be attracted to run for President in the bundled world, but would no longer be in the unbundled world, are likely to be those for whom aggregate power is most important: individuals for whom being the person in control of everything. Perhaps this group makes for good Presidents, but it seems to have most in common with megalomaniacs. In other countries, this would be a group of likely dictators. Making the election of aspiring dictators less likely hardly seems a mark of shame for any executive regime.

What about the top of the distribution? Would the unbundled executive manage to select the best candidates? No electoral system is perfect, but we suspect the unbundled executive would perform better on this front than the bundled regime. Indeed, this is part of the beauty of the unbundled executive regime. In a world with a single executive, voters must trade-off desirable executive attributes on less important dimensions for desirable attributes on more important dimensions. The unbundled regime requires fewer of these tradeoffs. Voters need not find a single person who is both strong and wise and compassionate and so on; citizens can tailor the importance of a single executive attribute to a single policy domain. Our hope is that this would make for higher quality executives along each dimension. Each individual executive would be a better fit for their policy area. Therefore, the average executive quality within a domain would generally rise. For this not to increase average executive quality, it would have to be the case that in some domains, the selected unbundled executive performs much worse than the bundled executive. On balance, the net selection effects then would seem to be either quite positive or negligible.

### III. Collateral Consequences

The burden of persuasion for this paper is significant, but what if all we have said thus far is correct and the unbundled executive would outperform the current bundled executive? Would this revision to the constitutional order generate other collateral consequences that are clearly undesirable? We think the answer to this question is yes and no. Adopting an unbundled executive would produce collateral consequences. Many of these are desirable; others are straightforward to remedy with relatively minor adjustments the constitutional structure. The relevant thought experiment is to maintain the basic contours of the U.S. constitution and compare the current perfectly bundled executive to a partially unbundled executive. No doubt this adjustment raises numerous potential complications; we note several prominent ones herein.

#### A. Separation of Powers

Suppose one wanted to maintain the rest of the constitutional structure, while adjusting article II to create an unbundled executive. What are the implications for separation of powers concerns? If the concern is balance of powers, then so long as the scope or breadth of legislative, executive, and judicial powers are held constant, the unbundled executive does not disrupt whatever parity of powers does (or does not) exist in the current system. The executive might have too much or too little power vis-à-vis Congress today, but the unbundled executive would
not upset this balance. If the concern is avoiding encroachment, then the unbundled executive might actually fare better. Elected executives with responsibility only for some policy dimensions would be less likely (because less able) to trade legislative encroachments in one policy area for executive gains in another. That is, the unbundled executive helps avoid legislative encroachments achieved by bargain rather than by fiat.84 Many of the most prominent recent separation of powers cases like Bowsher v. Synar85 or United States v. Chadha86 involve issues of exactly this sort. Violations of separation of powers principles tend to occur with the consent of two branches rather than unilateral incursion by one. If the unbundled executive prevents even some of these, branch relations would be improved not worsened.

However, because the unbundled executive increases public control over executive policy, the unbundled executive might be more constrained than the bundled executive. It seems awkward to call this executive weaker instead of more accountable, but for the sake of argument suppose this does makes the executive less powerful relative to the legislature. The unbundled executive still does not produce legislative dominance.

The reason is that the extent of unbundling in the executive branch is not the only dimension along which institutional arrangements can be adjusted. The unbundled executive could easily be adjusted to preclude independent officers—that is to create stronger unitary control that would enhance the power of various unbundled executives. Other alternatives might also ratchet up executive power to easily compensate for any marginal reduction stemming from unbundling. More important, the extent of executive power has grown exponentially since the founding. Congress’ powers have grown, but clearly at a less rapid pace. If the founders’ intent was to produce an initial balance or parity among the branches, surely it is the executive branch’s power that is now out of whack. If the unbundled executive weakens the executive—although again, we think it does not—it might actually bring the branches closer to parity, bringing the balance of power closer to that originally contemplated and in the process enhancing the degree of accountability in the executive branch.

B. Presentment

The unbundled executive also raises novel questions about other constitutional structures. For example, article I section 7 requires bicameralism and presentment to enact a valid law.87 With multiple executives, who would sign? All the executives, none, one? Questions like these are far from the path on which we started, and therefore our views are necessarily tentative. However, several scenarios present themselves.

The most likely one would be for a Congress or an institutional actor like the House or Senate parliamentarian to designate the executive with the relevant policy authority.

84 Virtually all modern separation of powers cases are the result of a consensual bargain between the President and the United States. The cases challenge statutes passed by Congress and signed by the President. Characterizing most of these as power grabs by the legislature or the president is awkward. Both institutions consented. This is not to say that such arrangements are or ought to be permitted by the Constitution. But it is important to bear in mind that the unpermitted arrangements are generally supported by Congress and the Executive.


86 462 U.S. 919 (1983)

87 U.S. Const., art. I, sec. 7.
Transportation legislation would be signed by the transportation executive. This could create the opportunity for gaming, of course. Legislation could be framed as a transportation bill when in fact it was a welfare bill. But these are standard problems within Congress as well. House and Senate rules typically require that legislation be referred to the committee with the most relevant jurisdiction. Historically some gaming has emerged, but for the most part, committees guard their turf and bills are sent to the appropriate one. Loose norms have generally been sufficient to prevent a breakdown of the rules. If the practice works reasonably well within Congress, there is no reason to think it would work substantially worse across branches.

Even better would be to designate links between Congressional committees and special unbundled executives ex ante. Then decisions about which committee to send a bill to would produce an automatic decision about which executive to present the bill. Here too there could be gamesmanship. Legislation with no possibility of being signed by the transportation executive might be packaged as welfare legislation or vice versa. Although our intuition is that these problems are not nearly as severe as others that plague the current state of affairs, our system cannot avoid them entirely. Still, the unbundled executive entails a straightforward method of disciplining such behavior. If the transportation executive signs welfare legislation, and if voters care, it is easier to express displeasure with electoral sanctions in the unbundled executive world than in the bundled executive world.

C. Logrolls

If unbundled executives could only sign legislation that is within their policy domain, would that not eliminate the possibility of logrolls and omnibus legislation? Within a policy domain, big legislative packages and logrolls would still be possible. Therefore, it seems likely that the current practice of enacting big transportation bills every several years would continue; such legislative packages do contain and would continue to contain plenty of logrolls and side-deals, for better or for worse.

Across policy domains, however, logrolls and omnibus legislation would be marginally more difficult. This does not seem especially tragic and there are those that would applaud the effect. Some logrolls however are welfare enhancing rather than wasteful. If inter-policy logrolls are especially important according to some external theory of the good, then our system could be adjusted to allow for them. Consider the following proposal: legislation covering two policy domains must be presented to both the relevant executives. If both sign, the bill becomes law. If neither signs, the legislature could override the veto with a supermajority vote of 2/3. If one executive signs and the other does not, the legislature could override the single veto with a vote of 3/5 (or some other lesser variant). Upon more serious consideration, these alternative regimes might be good or bad, but the basic unbundled executive structure is flexible enough to incorporate such changes or not as others prefer.

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88 See, e.g., Rule XVII, Standing Rules of the U.S. Senate.

D. Administrative Agencies

Although the executive has many important duties, managing administrative agencies and regulatory policy is surely near the top of the list. Would the unbundled executive turn administrative law and regulatory policy into a greater morass than it is already? We cannot say that there would be no complications, but the most obvious trouble spots do not suggest a drastic conceptual overhaul is necessary. Consider the dominant trend over the past several decades towards more centralization and coordination of administrative agencies?90 Does this not suggest we are swimming upstream in current even stronger than it first appears?

Note that one of the main justifications for increasing presidential control over agencies has to do with democratic accountability.91 The president is directly elected by a national constituency and agency heads are not. More control over agencies is better for democracy and majoritarian preferences.92 But in the unbundled executive world each executive is directly elected. There is no question that a directly elected Environment Executive is vastly more democratically accountable than a single general purpose executive who oversees environmental policy, along with hundreds of other policies, indirectly.

The other main justification given for greater centralized control of the bureaucracy is the need for inter-risk or inter-policy tradeoffs—roughly speaking this is coordination concern. Just as agencies with a single mission might pursue policy goals with blinders, so too might unbundled executives.93 This lack of coordination could produce bad policy, although whether it would typically produce policy that is better or worse on average seems an open question. The simplest thing to say is that this is a real concern. The comparative advantage of the unbundled executive, however, is that if the public is upset that some unbundled executive is pursuing policy goals in too single-minded a way, then the public can vote that person out office. The relevant unbundled executive has done a bad job; our structure provides a more effective way to correct this problem than the current bundled structure.

Another alternative, which we have not seriously explored, would be to create an inter-policy tradeoff executive. Her policy domain would be inter-policy or inter-risk trades and nothing else. A public frustrated with the tunnel vision of unbundled executives could either discipline the executive behaving with tunnel vision or discipline the coordinating executive. In effect, there could be an unbundled executive in charge of OIRA.94 The details of whether the


92 But see Matthew C. Stephenson, Optimal Political Control of the Bureaucracy (unpublished manuscript 2007).


OIRA executive could veto or initiate new rules would have to be worked out, and we certainly have not done so. However, we suspect one could do so in a sensible way that would not debilitate either the administrative or the unbundled executive scheme.

The unbundled executive might even help solve some standard problems in administrative law. For example, it has long been unclear how courts should deal with deference to agencies with overlapping jurisdiction. Standard deference doctrines encourage courts to defer to agencies, but when agencies share jurisdiction, courts must decide to which agency deference is owed. In the current regime, this is a problem mainly because of overlapping jurisdiction; it is easy to solve by creating agency jurisdiction that is exclusive rather than shared. Similarly, the unbundled executive with exclusive policy authority actually solves *Chevron* problems rather than creates them. There is a clear institutional actor—the unbundled executive—to whom deference is owed or not, as standard deference doctrine dictates. By trending towards, indeed by requiring, exclusive policy jurisdiction, the unbundled executive would resolve some of these standard difficulties in administrative law doctrine.

### E. Majoritarianism & Minoritarianism

We have suggested that a major advantage of the unbundled executive is greater democratic responsiveness. We have urged that the structure enhances accountability. Another line of attack on our argument would go as follows. Institutional design in a constitutional democracy must balance many goals. Our constitution hardly cries out as a majoritarian document. It is riddled with provisions that make it harder rather than easier to enact majoritarian views. Protecting minority views is a competing value and it seems likely the unbundled executive would produce too much accountability. We agree that the constitution does and should balance the implementation of majoritarian views with the protection of minority positions. If the existing constitution gets the mix exactly right, then any deviation towards more or less accountability would be suboptimal, our proposal included.

However, there is a way in which the unbundled executive is, or could be, minoritarian, albeit in a subtle way. Recall that as executive authority is unbundled, there is a corresponding increase in monitoring costs. Suppose executive authority was unbundled such that there were 20 executives. When policy issues are unbundled by creating specialized executives with exclusive authority to make policy, the costs of participation for voters, e.g., gathering information and voting, increase. A plausible inference is that as a result of increasing costs, participation is lower in unbundled elections or that there is falloff such that voters vote for some but not all of the unbundled executives on the ballot. There is empirical evidence to support the supposition that participation is selective in unbundled elections. For example, Terry Moe has shown that teachers union members are up to 7 times more likely to participate in the

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96 Id. (arguing that Congress might intentionally generate exclusive or concurrent agency jurisdiction to encourage or discourage agencies from regulating in new policy domains).


98 There is empirical evidence to support the supposition that participation is selective in unbundled elections. For example, Terry Moe has shown that teachers union members are up to 7 times more likely to
executive election for the issue she cares about most. Citizens with high interest in the issue are more likely to constitute a majority of voters for the given unbundled executive office, even if they are a minority of all voters. This is essentially a selective participation effect, in which minorities will control elections (and by extension outcomes) in the policy domains they care most about. This result is not inevitable, but it is entirely plausible. Thus, while the general theme of the unbundled executive is majoritarian, there are scenarios in which the unbundled executive can protect and even enhance the ability of minorities to control politics.

F. Emergencies & Change

Much of our analysis is static in an important sense. It assumes that the relevant policies dimensions can be identified ex ante and that a specific unbundled executive could be elected to control those policies. In the real world, of course, things are not so straightforward. New policy dimensions emerge; others fade away. When there is but one general purpose executive, these shifts take care of themselves. When authority is unbundled, matters are more complicated. If the bundled executive is better able to adapt or deal with emergencies, is this not a significant knock on the unbundled executive?99

The ability of institutional structures to incorporate changing circumstances is important, but there are two reasons the unbundled executive does not falter here. First, throughout our discussion, we have emphasized the optimality of partial unbundling. At no point have we suggested that perfect unbundling would be desirable. Thus, in our proposed regime, there is always what might be termed a residual executive, the executive who has authority over all issues that have not been unbundled. At the margin, this executive is more accountable than a single general purpose executive.

When new policies or problems arise, the residual executive can address them just as the existing totally bundled executive can do. This is true of gradual change, but it is also true of more acute challenges like emergencies. The unbundled executive is not debilitated when emergency strikes, or at least is no more debilitated than the bundled executive. The ability to react to subtle or sudden changes in social circumstances is a value of both the current and proposed regimes.

This response addresses what we take to be the more severe concern about the unbundled executive. But what if new issues emerge that would best be unbundled or previously unbundled regimes wane in importance? This problem has been faced by state and local governments for many years. New elected offices are created with some frequency in the United States. There are costs to doing so, but they are not particularly insurmountable. The structure of the executive branch has changed enormously from the founding; today’s cabinet level officers are not the same as those established early in our history. Although it is somewhat rarer to eliminate offices, this also occurs at all levels of government. As society changes, political institutions do as well.

If old unbundled executives should be eliminated and new unbundled executives created, so be it. These design problems are real, but they are third-order considerations. If the unbundled executive is to be rejected, we doubt it will be on these grounds.

CONCLUSION

Our vision of the unbundled executive is preliminary, and perhaps it is a singularly unlikely one as well. Still, unbundling executive authority seems to systematically produce desirable effects on political institutions in representative democracies. Reform movements in the states have long experimented with different structures of executive authority, and we suggest constitutional design more generally might benefit from some of these lessons. At a minimum, our work provides a counterweight to many wrong-head assumptions in modern constitutional theory. Our work is mainly about constitutional possibilities rather than constitutional realities. We certainly do not claim that the most sensible or even any plausible reading of the U.S. Constitution establishes a plural unbundled executive; but perhaps it should. And to the extent the current constitutional structure would allow for modest adjustments toward the unbundled executive ideal, our work suggests such reforms would produce a government structure more in keeping with the democratic ideals most commonly said to justify the single unitary executive. The plural executive position has long been lampooned in constitutional theory. The unbundled executive suggests it should be lampooned somewhat less.


Table 1. State Government Elected Officials, 1967-1992

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Source: *Census of Governments*
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Source: *Book of the States*

Readers with comments may address them to:

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